Supreme Court, U. S.
FILED
APR 4 1977

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 197___

NO. 76-1353

THOMAS E. KUYKENDALL,

PETITIONER

VS

SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES ----------	i
OPINIONS BELOW ----------	2
JURISDICTION ----------	2
QUESTIONS PRESENTED ----------	3
STATUTORY PROVISIONS INVOLVED ----	3
STATEMENT OF THE CASE----------	5
REASONS FOR GRANTING THE WRIT ----	10

1. THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE TRIAL COURT AND THE COURT OF APPEALS DID NOT APPLY THE RULE UNIVERSALLY RECOGNIZED BY BOTH THE COURTS OF THE UNITED STATES AND THE STATE OF TEXAS, THAT IN DIRECTED VERDICT SITUATIONS, A REVIEWING COURT MUST CONSIDER THE EVIDENCE AT ITS STRONGEST ON BEHALF OF THE PLAINTIFF, IN ADDITION TO GIVING HIM THE ADVANTAGE OF EVERY FAIR AND REASONABLE INTENDMENT WHICH THE EVIDENCE COULD JUSTIFY--- 10

2. THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE TRIAL COURT AND THE COURT OF APPEALS REFUSED TO RECOGNIZE THAT ANY AGREEMENT TO ACCEPT ANY BENEFIT IN CONSIDERATION OF ABSTAINING FROM, DISCONTINUING OR DELAYING THE PROSECUTION OF ANOTHER FOR AN OFFENSE IS ILLEGAL, AND THEREFORE VOID; THAT IN VIEW OF THIS BASIC LEGAL PROPOSITION, THE COURTS OF THE UNITED STATES AND THE STATE OF TEXAS CANNOT FORCE A PLAINTIFF TO PROVE WHAT PART OF A SETTLEMENT WAS PAID FOR A CIVIL RELEASE AND WHAT PART WAS PAID FOR ABSTAINING FROM OR DISCONTINUING THE PROSECUTION OF THE PLAINTIFF BY THE VICTIM---------- 24

CONCLUSION---------- 34

CERTIFICATE OF SERVICE ---------- 34

APPENDIX A ---------- 1-3
(Opinion of the United States Court of Appeals)

APPENDIX B ---------- 1
(Notice of Order Denying Petition for Rehearing by Court of Appeals)

APPENDIX C ---------- 1-11
(Memorandum and Order of District Court)

APPENDIX D ---------- 1-2
(Letter of Counsel for Respondent to Counsel for Petitioner Regarding testimony of Respondent's Employee)

APPENDIX E ---------- 1-6
(Release)

APPENDIX F ---------- 1-3
(Consent Judgment)

LIST OF AUTHORITIES

Bank of Tucson v Adrian, 245 FS 595
(Affm'd 351 FS 949) ---------- 31

Cooper v Dasher, 290 US 106 ---------- 33

Erickson v Rocco, 433 SW2 746 --------- 31

George v Leonard, 71 FS 665 ---------- 31

Merrell v Timmons, 158 SW2 278 ------- 28

Myers v American Well Works,
114 F2 252 (Cert. Denied 313 US 563)- 20, 22

Triangle Motors of Dallas v Richmond,
258 SW2 60 ---------- 21

Trinity National Bank v Gates,
261 SW 833 ---------- 30

United States Fidelity & Guaranty Co.
v Carr, 242 SW2 224 ---------- 21

Upton v Western Ins. Co., 492 F2 148 --- 21

Winn v Continental Casualty,
494 SW2 601 ---------- 11, 25

Other Authorities:

Article 32.02, Texas Code of Crim. Proc. - 31

Article 428, Texas Penal Code ---------- 3, 27

Section 38.06, New Penal Code ---------- 4, 27

13 Tex. Jur. 2d 373 ---------- 28

17 Am. Jur. 2d p. 571---------- 28

23 Tex. Jur. 2d, 126 ---------- 32

23 Tex. Jur. 2d 141 ---------- 32

17 CJS 1064 ---------- 31

29 Am. Jur. 2d 209 ---------- 33

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THOMAS E. KUYKENDALL,

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VS

SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY,

RESPONDENT

_____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

The Petitioner, Thomas E. Kuykendall, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United

States Court of Appeals for the Fifth Circuit, entered in this proceeding on November 29, 1976, and to the order of that court dated January 3, 1977, denying the Petitioner's Petition for Rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, which appears at Appendix A, pages 1 thru 3, is not reported. The Court of Appeals stamped on it the words "DO NOT PUBLISH." A notice dated January 3, 1977, advising counsel for all parties that an order denying Petitioner's Petition for Rehearing was entered on said date, appears at Appendix B, p. 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered November 29, 1976. A timely Petition for Rehearing was denied on January 3, 1977. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in finding as a matter of fact that the consideration paid by the Petitioner-Plaintiff to the victim was dual, that is, the settlement of the Victim's civil claim plus the promise of the victim to write a letter asking that criminal charges against the Petitioner-Plaintiff be dropped, and in affirming the judgment of the trial court on that ground.

2. Did the Court of Appeals err in finding as a matter of law that the Petitioner-Plaintiff must have presented proof of the respective amounts allowable to the separate undertakings of the victim, and in affirming the judgment of the trial court on that ground.

STATUTORY PROVISIONS INVOLVED

Old (as repealed) Article 428 of the Texas Penal Code:

"Whoever has knowledge that an offense

against the penal laws of this State has been committed, and shall agree with the offender, directly or indirectly, not to prosecute or inform on him in consideration of money or other valuable thing paid, delivered or promised to him by such offender, or other person for him, shall be fined not less than one hundred nor more than one thousand dollars."

Section 38.06 of the New Penal Code effective January 1, 1974:

"(a) A complaining witness commits an offense if, after criminal proceedings have been instituted, he solicits, accepts, or agrees to accept any benefit in consideration of abstaining from, discontinuing, or delaying the prosecution of another for an offense.

(b) An offense under this section is a Class A misdemeanor.

STATEMENT OF THE CASE

Federal Jurisdiction in the Court of the first instance was invoked because of diversity of citizenship of the parties. Title 28, Section 1332, United States Code.

On June 19, 1971, the Petitioner (plaintiff) in this case, Thomas E. Kuykendall, son of rancher, Charles R. Kuykendall, is alleged to have shot one Eusebio Guerrero Guillen, a citizen of the United Mexican States, illegally in the United States, in the foot and in the arm, on one of the ranches leased by this Petitioner's father. A civil suit for damages was filed against this Petitioner and his father by Guillen, on July 29, 1971, in the 111th District Court of Webb County, Texas, and was removed on petition by the defendants to the United States District Court for the Southern District of Texas, Laredo Division, in Civil Action No. 71-L-28. In that case the Court ruled as a matter of law, that the father

was not responsible for the shooting, that this Petitioner, the son, was responsible and submitted the damage issue only. The jury returned a verdict of $12,500.00, and from that judgment both parties appealed. In Cause No. 72-2865 in the United States Court of Appeals for the Fifth Circuit, styled Eusebio Guerrero Guillen vs C.R. Kuykendall and Thomas E. Kuykendall, the case was reversed and remanded for another trial. Shortly before that trial was to be held, the case was settled by the payment to Guillen by C. R. Kuykendall of $4,000.00 in cash, and the entering of an agreed judgment in Cause No. 71-L-28, against the Petitioner herein, Thomas E. Kuykendall, and in favor of Guillen for $8,500.00. When the suit in 71-L-28 was filed, the Petitioner herein was a minor, and C. R. Kuykendall did not realize he had an insurance policy that would probably cover this occurrence. On September 19, 1971, Mr. Kuykendall called his

attorney, J. G. Hornberger, of Laredo, Texas, to his home to examine his various insurance policies. It was ascertained that he had one policy, Southern Farm Bureau Casualty Insurance Company Policy No. 521524 effective from August 27, 1970, to August 27, 1971, which would possibly cover this occurrence, and on September 22, 1971, the Kuykendall's attorney, J. G. Hornberger, wrote to the Southern Farm Bureau Casualty Insurance Company advising them of the occurrence and requesting that it undertake the defense of the case. On September 27, 1971, the attorney was advised by letter from the Texas Farm Bureau Insurance Companies that the matter was being referred to their adjuster, Mr. Jim Foster, in Robstown, Texas, and that Mr. Foster would contact the attorney and his client in the very near future. The case was assigned to the adjuster by letter of the same date. On November 3, 1971, the adjuster, Mr. Foster,

contacted the Kuykendalls, secured a non-waiver agreement from Mr. Kuykendall and took a statement from C. R. Kuykendall on a recorder. The adjuster never contacted the attorney. By letter dated November 24, 1971, the Respondent-defendant insurance company advised the attorney for Mr. Kuykendall that coverage was denied. Correspondence was had thereafter between the attorney for the Petitioner herein and the Respondent insurance company, but each time the Respondent insurance company refused to defend and denied coverage. This present case was filed on March 1, 1974. Prior to the trial of this case, on motion of the Respondent, the case was dismissed as to C. R. Kuykendall because his claim was not in excess of $10,000.00, and such case was refiled in the 111th District Court of Webb County, Texas, being Cause No. 28,973, styled C. R. Kuykendall vs Southern Farm Bureau Casualty Insurance

Company, which case is still pending. On December 3, 1974, this case was called for trial before a jury and on December 4, 1974, the Court granted the defendant's motion for an instructed verdict stating that he would file a memorandum in the matter. On March 3, 1975, such memorandum and order was filed in which the Court stated that the motion for a directed verdict was granted in the following terms:

> "Briefly, the Court concluded there was a failure to give proper notice under the policy; the injury was not covered by the policy; and the settlement amount paid was, in part, for considerations other than Guillen's personal injuries, but no apportionment was shown."

The Court then went into detail on these matters. (The trial court's Memorandum and Order appears at Appendix C, pages 1 thru 11 .) On March 3, 1975, final judgment was entered in favor of

the defendant (Respondent) and it is from this judgment that the Petitioner perfected his appeal to the Court of Appeals.

By letter dated February 4, 1977, a copy of which appears at Appendix D, the Petitioner's attorney was advised by the Respondent's attorney that the testimony that an employee of the Respondent Insurance Company gave on the trial of this case was not accurate, and that the true facts are as set forth in this letter. A motion to vacate the judgment of the District Court is being filed with the District Court under the provisions of Rule 60 (b) of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

I

THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE TRIAL COURT AND THE COURT OF APPEALS DID NOT APPLY THE RULE UNIVERSALLY RECOGNIZED

BY BOTH THE COURTS OF THE UNITED STATES AND THE STATE OF TEXAS, THAT IN DIRECTED VERDICT SITUATIONS, A REVIEWING COURT MUST CONSIDER THE EVIDENCE AT ITS STRONGEST ON BEHALF OF THE PLAINTIFF, IN ADDITION TO GIVING HIM THE ADVANTAGE OF EVERY FAIR AND REASONABLE INTENDMENT WHICH THE EVIDENCE COULD JUSTIFY.

The Court of Appeals has found as a matter of fact and as a matter of law that "The plaintiff made a single payment to the shooting victim, the consideration for which was dual-settlement of the victim's civil claim plus the promise of the victim to write a letter asking that criminal charges against the insured be dropped" and further finds that Winn v Continental Casualty 494 SW2d 601 (Tex. Civ. App., 1973, no writ), sets forth the governing law of Texas.

This finding of fact had to be based on some

or all of the following evidence adduced at the trial:

1. The following testimony of the Plaintiff, Thomas E. Kuykendall:

Q And criminal charges were filed against you?

A Yes, sir.

Q And you posted bond, I think?

A Yes, sir.

Q And you appeared in the 49th District Court on a number of occasions when your case was called?

A Yes, sir.

Q And ultimately that charge was dropped and dismissed, was it not?

A Yes, sir.

Q Now did you take any action in relation to the civil suit that was brought against you and your father or, was it, did you let your father handle that?

A I let my father handle that. (Lines 20-25, p. 36; lines 1-8, p. 37, 1st. Supp. Record on Appeal.)

Q When the civil suit was brought against you and your father for damages, did you have, did you do anything about that or did you let your father take control of that and handle it for you?

A No, no, I let my father handle it.

Q You were in school and a student at the time?

A Yes, sir. (Lines 13-19, p. 37, 1st Supp. ROA).

Q Now as I said before, the civil case was between Mr. Guillen and you and your daddy, and it was tried once, and the jury gave Mr. Guillen twelve thousand dollars, is that right, twelve thousand five hundred dollars?

A Yes, sir.

Q Then it got reversed?

A Yes, sir.

Q And then it was supposed to be tried again, is that right?

A Yes, sir.

Q All right, so you made a deal with Mr. Guillen,

you and your daddy, didn't you?

A Yes, sir. (Lines 1-13, p. 46, 1st Supp. ROA).

Q Under that deal with Mr. Guillen, your daddy paid him four thousand dollars in cash, didn't he?

A Yes, sir.

Q And you agreed to a judgment against you for eight thousand two hundred and fifty dollars, wasn't it?

A Yes, sir. (Lines 2-7, p. 47, 1st Supp. ROA).

Q Now that was part of the deal, he was to dismiss the criminal charges if, if you settled with him, wasn't it?

A Well--

Q --Isn't that right?

A Yes, sir.

Q And you did settle with him on the terms that we have said?

A Yes, sir. (Lines 20-25, p. 48; lines 1-2, p. 49, 1st Supp. ROA).

Q Do you recall why it was that we settled with Mr. Guillen on the basis that we did settle with him, why it was recommended that we settle on that basis?

A Yes, sir.

Q Why was that?

A What, what happened was, it was less money.

Q Less money than what?

A Than what they had, than before.

Q Tom, I don't quite understand you, less money than the jury had awarded or less money than was being sued for?

A Less money than being sued for. (Lines 14-24 p. 52, 1st Supp. ROA).

2. The following testimony of the victim:

Q Yes, sir, now, insofar as the criminal complaint, you filed a criminal complaint against Tom, didn't you?

A Yes, sir.

Q And did you write a letter to the District Attorney of Webb County, Texas, requesting him not to prosecute that case?

A Yes, sir, because we had made this arrangement. (lines 22-25p. 172; lines 1-3p. 173, 1st Supp. ROA).

3. The following testimony of counsel for Plaintiff:

A Well, I continued to defend the suit and we, of course, took numerous depositions and we tried the case here in the United States District Court before a jury. And Mr. Pena, the attorney for Guillen, appealed the case to the Court of Appeals in New Orleans. I filed a brief, of course, in that case, and we weren't asked to argue it, but the case was reversed on certain grounds for a new trial. And it was set up for a new trial, and, and the dates for the new trial was set, but during that time, Mr. Pena and I had many

conversations attempting to arrive at some kind of compromise settlement in view of the insurance company's denial of liability, and refusal to defend. The original verdict, I think was for twelve thousand five hundred dollars, and the suit was well in excess of fifty thousand dollars, and, and I discussed it with Mr. Kuykendall, the adviseability of trying to settle it as many things entered into the settlement. He had a good year in the cattle business, that's when cattle prices were a little bit better, and he had a good year, and it seemed to be beneficial financially to attempt to arrive at a settlement that year. At the same time, Mr. Pena was anxious to arrive at some sort of settlement, Mr. Guillen was still in this country and wasn't really working, and he needed some subsistence, too. That Tommy, of course, at this time, was, he didn't have, have any funds,

and he was what we would call judgment-proof, that he could take a judgment against him, but you can't collect it. So after much negotiations, Oscar Pena and I submitted to our clients a package kind of a deal, where Mr. Kuykendall himself, whom we didn't feel was responsible for Tommy's action--

MR. FINCK: --Excuse me, Your Honor, I don't think that has any--

THE COURT:--I don't either, Mr. Hornberger.

MR. HORNBERGER: I am sorry, sir.

BY THE WITNESS:

A That was one of the things that entered into the settlement consideration. In any event, in the, in the package deal, Mr. Kuykendall was to get a full release, agreed to pay four thousand dollars in cash to Mr. Guillen and his Attorney, and we entered an agreed judgment against Tommy, and I think the figure was for eight thousand two hundred and fifty dollars. I told

them at the time that it was certainly my intentions to file suit against the Insurance Company to collect, not only the monies that Mr. Kuykendall had paid out and the amount of the judgment for which Tommy is legally liable naturally, and--

MR. FINCK:--Again, Your Honor, I think this calls for a conclusion, and I don't think the jury has--

THE COURT:--Well, I don't believe that is actually a conclusion. I assume what you are doing now is testifying to the facts on which you are going to base your fees?

THE WITNESS: Yes, sir, yes sir.

THE COURT: I think I will sustain the objection to that last question, rather the answer.

BY THE WITNESS:

A That, I told Mr. Pena I was going to file suit

against the Insurance Company for the amount of the judgment that was entered against Tommy and the amount paid by Mr. Kuykendall to Mr. Guillen, as well as for my fees, reasonable fees that I felt were, that I felt were reasonable, as well as the expenses which I had incurred. (Lines 12-25, p. 132;lines 1-25, p. 133;lines 1-25, p. 134 and lines 1-2, p. 135, 1st Supp. ROA).

4. The release signed by the victim.

(Said Release is attached hereto as Appendix E).

5. The agreed judgment entered in Cause No. 71-L-28, which judgment appears as Appendix F.

The general rule on directed verdicts is set forth as follows in Myers v American Well Works, 114 F2 252, Certiorari Denied 313 US 563, "For the purpose of plaintiff's appeal from a judgment entered on a directed verdict for defendant in an action for breach of contract, the reviewing Court is required to consider the evidence at its strongest on behalf of

the plaintiff in addition to giving him the advantage of every fair and reasonable intendment which the evidence could justify." See also Upton v Western Life Ins. Co., 492 F2 148; and Triangle Motors of Dallas v Richmond, 258 SW2 60-Supreme Court of Texas-1953.

The Respondent contends that the Petitioner is bound by his judicial admission set forth as follows:

"Q Now that was part of the deal, he was to dismiss the criminal charges if, if you settled with him, wasn't it?

A Well--

Q --Isn't that right?

A Yes, sir."

(Lines 20-24, p. 48, 1st Supp. ROA).

which is not the case.

The San Antonio Court of Civil Appeals in United States Fidelity and Guaranty Co. v Carr,

242 SW2 224, Writ of Error Refused-1951, sets forth five rules that must apply before a party's testimony is conclusion against him. One of these is "that the statement is deliberate, clear and unequivocal." In enlarging on this the Court stated:

> "The hypothesis of mere mistake or slip of the tongue must be eliminated. 20 Am. Jur. 1032, Evidence, Sec. 1181. If the statement merely contradicts some other portion of the party's testimony, conclusive effect cannot be given thereto, but a fact issue is presented for the determination of the jury or the judge sitting without a jury as in the case of an ordinary witness."

Contrary to the decision in Myers v American Well Works, supra, and the numerous other cases with like holdings, this court apparently has disregarded the testimony of the Plaintiff-Petitioner as well as the attorney for the petitioner, the release signed by the victim and the agreed

judgment entered in Cause No. 71-L-28, and has based its decision on the testimony of the victim that he had written a letter to the District Attorney requesting him not to prosecute the case because "we have made this arrangement." Nowhere is there any testimony that even a part of the consideration for a release and agreed judgment was the dismissal or attempted dismissal of the criminal charges except that testimony of the plaintiff-petitioner appearing on pages 48 and 49 of the 1st Supplemental Record on Appeal. All of the rest of the testimony of the plaintiff-petitioner was to the effect that the sole consideration was the release and the entry of the agreed judgment. Therefore, the United States Court of Appeals did not consider the evidence at its strongest on behalf of the plaintiff-petitioner.

It is respectfully urged that there is not sufficient evidence in this case for this court to

hold as a matter of law that the consideration was dual. Quite on the contrary, the evidence, viewed in the light most favorable to the plaintiff-petitioner is that the consideration was solely for the release and agreed judgment. A mere hope on the part of the Petitioner that he would not be prosecuted does not constitute additional consideration. At the very least, a jury question is involved.

II

THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE TRIAL COURT AND THE COURT OF APPEALS REFUSED TO RECOGNIZE THAT ANY AGREEMENT TO ACCEPT ANY BENEFIT IN CONSIDERATION OF ABSTAINING FROM, DISCONTINUING OR DELAYING THE PROSECUTION OF ANOTHER FOR AN OFFENSE IS ILLEGAL, AND THEREFORE VOID; THAT IN VIEW OF THIS BASIC LEGAL PROPOSITION, THE COURTS OF THE UNITED

STATES AND THE STATE OF TEXAS CANNOT FORCE A PLAINTIFF TO PROVE WHAT PART OF A SETTLEMENT WAS PAID FOR A CIVIL RELEASE AND WHAT PART WAS PAID FOR ABSTAINING FROM OR DISCONTINUING THE PROSECUTION OF THE PLAINTIFF BY THE VICTIM.

The Trial Court and the Court of Appeals inspite of the fact that they based their decision on Winn vs Continental Casualty Company, 494 SW2d 601 (Tex. Civ. App., 1973, no writ) actually have decided an important State question in a way in conflict with applicable state law. The Winn case is a decision by the Tyler Texas Court of Civil Appeals and there is no decision of the Supreme Court of Texas on this question. The Winn case was decided on facts completely different from the case at hand.

(a) In the Winn case there was no evidence

that the victim ever asserted a claim against Winn which was covered by the policy of insurance. The opposite is true in this case.

(b) The trial court found that the evidence clearly showed that the principal purpose of the negotiated settlement was for the purpose of inducing the victim to drop his assault-to-murder charges-- which he did. This is not true in the case at hand.

(c) In the Winn case, the victim's attorney testified, when asked what facts were considered when he recommended a settlement to his client that "There were many factors to consider; initially the one I was most immediately concerned about, of course, was the possibility of a criminal prosecution." There was no such testimony in the case at hand.

(d) The Winn case involved a pre-suit settlement-the exact opposite from the case at hand.

If the Winn case represents the governing law of Texas, it is governing law only on its specific facts and findings.

Old Article 428 of the Texas Penal Code (superseded by Sec. 38.06 of the new Penal Code effective January 1, 1974, reads as follows:

"Whoever has knowledge that an offense against the penal laws of this State has been committed, and shall agree with the offender, directly or indirectly, not to prosecute or inform on him in consideration of money or other valuable thing paid, delivered or promised to him by such offender, or other person for him, shall be fined not less than one hundred nor more than one thousand dollars."

Section 38.06 reads as follows:

(a) A complaining witness commits an offense if, after criminal proceedings have been instituted, he solicits, accepts, or agrees to accept any benefit in consideration of abstaining

from, discontinuing, or delaying the prosecution of another for an offense.

(b) An offense under this section is a Class A misdemeanor.

In Merrell v Timmons, 158 SW2 278, 1941, the Supreme Court of Texas held that "It is elementary that either a note or deed of trust made in violation of the provisions of Article 428 of the Penal Code is void."

In 13 Tex. Jur. 2d at page 373, it is stated:

"Contracts made in consideration of a promise not to prosecute a person for a crime committed by him, as well as contracts made in consideration of an agreement to secure the dismissal of a pending criminal prosecution, are unenforceable because they are in contravention of express law and public policy."

In 17 Am. Jur. 2d at page 571, it is stated:

"It is to the interest of the public that the

suppression of prosecution should not be made a matter of private gain. Frequently, an agreement relating to the suppression of criminal prosecution is one of the terms in a settlement with the victim of the crime. Such settlements, which usually involve compensation by the offender or by someone acting in his interest for the injuries resulting from the crime or restitution of the property wrongfully appropriated, are made with the understanding that the offender is not to be prosecuted. The making of such an arrangement is usually called 'the compounding of an offense.' The objection to such an agreement is that it tends to benefit an individual at the expense of defeating the course of public justice. It has even been suggested that if it were to be understood as the law that such compromises are binding and may be enforced, it would result in an increase in the number of presentments found at the instance of

injured persons who would expect thereby ultimately to secure the payment of their claims against the offenders.

The general principle that the compounding of offenses is illegal has never been doubted--in fact, the compounding of crimes is itself a crime in some jurisdictions."

See also Trinity National Bank v Gates, 261 SW 833, (Tex. Civ. App. Texarkana-1924, no writ) in which the Court stated:

"It is too apparent to be doubted that the real consideration for the execution of the note and mortgage involved in this suit was the dismissal of a pending prosecution. Appellee stated that he was given that assurance before he consented to sign the note and deed of trust. The law does not permit proceedings of this character to be made a subject matter of contract between private parties.

An agreement of that kind is illegal, because contrary to public policy."

In George v Leonard, 71 FS 665, D. C. S. C. - 1947, the Court stated that "When one begins a criminal prosecution in good faith, the case should be prosecuted to the end that the law may be vindicated, and compounding a felony is illegal, and agreements involving such compromises either in whole or in part are void." See also Bank of Tucson v Adrian, 245 FS 595, affirmed 351 F2 949.

See also 17 CJS at page 1064.

It is readily apparent that the victim, Guillen, could not cause the criminal prosecution to be dismissed. Only the District Attorney, with the permission of the Court may do so. See Article 32.02 of the Texas Code of Criminal Procedure.

Therefore, any agreement to secure a dismissal was impossible of performance and therefore not enforceable. See Erickson v Rocco, 433 SW2 746 (Tex. Civ. App. -Houston, 1968-writ

ref'd, nre).

In addition, the Court of Appeals has found that the Petitioner and the victim entered into a contract at least partially void. Since that portion of the contract calling for a dismissal or attempted dismissal of the criminal charge was void, there wa a complete failure of consideration, if indeed such consideration ever existed, and therefore the consideration was obviously for the release in the civil cases.

The law does not presume that persons enter into an unlawful or void agreement.

In 23 Tex. Jur. 2d at p. 141, it is stated:

"For example, it will be presumed, in the absence of contrary evidence, that the parties to a contract not only intended to act lawfully to make a valid agreement, but also that they have done so in fact and that they are conducting their business affairs in a lawful manner."

At page 126 of the same volume, it is

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stated that:

"Furthermore, the courts will not assume that persons will attempt to execute impossible undertakings."

In 29 Am. Jur. 2d at page 209, it is stated:

"The presumption is that the law has been obeyed, it being presumed, in the absence of proof to the contrary, that everyone obeys the law, and does not intend to violate it, which presumption is closely allied to the presumption of innocence which prevails in criminal cases." See Cooper v Dasher, 290 US 106.

A companion case, being C. R. Kuykendall vs Southern Farm Bureau Casualty Insurance Company, is now pending on the docket of the 111th District Court of Webb County, Texas, and will undoubtedly be tried during this year. The same issues and the same questions will then be presented to the State Court for adjudication.

WHEREFORE, Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

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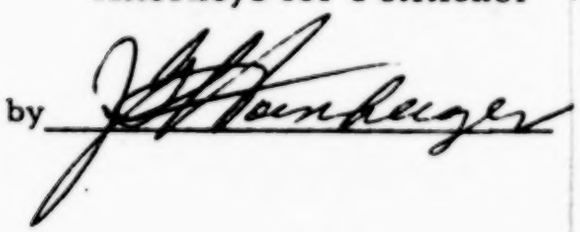
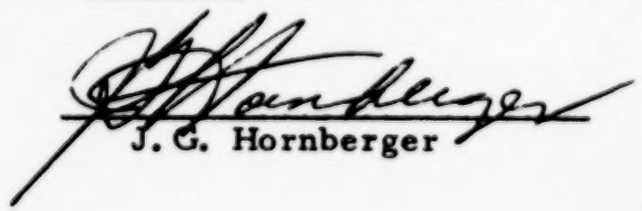
by 

I certify that a copy of the above and foregoing Petition for a Writ of Certiorari was mailed to counsel for Respondent, Mr. Edward R. Finck, Jr., 1805 NBC Building, San Antonio, Texas 78205, on the 29th day of March, 1977.



J. G. Hornberger

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 75-1690

THOMAS E. KUYKENDALL,
Plaintiff-Appellant,

versus

SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

(November 29, 1976)

Before JONES, WISDOM, and GODBOLD, Circuit Judges.
PER CURIAM:

Plaintiff, the insured under a general liability policy, sued for the cost of settlement and expenses incurred by him in settling a claim against him asserted by a person he had shot.

The District Court entered a directed verdict for the insurer on three alternative grounds: failure to give notice, lack of coverage because the shooting was intentional, and failure of plaintiff to prove damages. We need not consider the first two because the third ground was good under the governing law of Texas. The plaintiff made a single payment to the shooting victim, the consideration for which was dual--settlement of the victim's civil claim plus the promise of the victim to write a letter asking that criminal charges against the insured be dropped. Winn v Continental Casualty Co., 494 S.W.2d 601 (Tex. Civ. App., 1973), requires one in the position of plaintiff to prove the amount paid in settlement of the civil claim since any part of the payment that was made in consideration of the promise concerning the criminal charge would not be even arguably covered. Plaintiff made no proof of the respective amounts allowable to the separate under-

takings of the victim but only proved a single gross amount. Under Winn the directed verdict was proper.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

January 3, 1977

TO ALL COUNSEL OF RECORD

NO. 75-1690-Thomas E. Kuykendall v
Southern Farm Bureau Casualty
Insurance Co.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, Clerk
by S/ Susan M. Gravois
Deputy Clerk

/smg
cc: Mr. J.G. Hornberger
Mr. Edward R. Finck, Jr.

IN THE DISTRICT COURT OF THE
UNITED STATES-FOR THE SOUTHERN DISTRICT
OF TEXAS-LAREDO DIVISION

THOMAS E. KUYKENDALL |

V. |C.A.NO. 74-L-6

SOUTHERN FARM BUREAU |
CASUALTY INSURANCE
COMPANY

MEMORANDUM AND ORDER

This suit arises out of the alleged wrongful failure of the Defendant insurance company to defend the Kuykendalls in Civil Action No. 71-L-28, Eusebio Guerrero Guillen v Thomas Kuykendall and C.R. Kuykendall. Guillen, a Mexican alien, sued the Kuykendalls for personal injuries he received while crossing ranch land owned by C.R. Kuykendall. He was wounded by a rifle bullet fired by this Plaintiff, Thomas E. Kuykendall, sone of the owner. Upon the Defendant's refusal to admit coverage, the Kuykendalls were forced to defend, at their own expense, against the alien's suit. Guillen

ultimately obtained an $8,250 settlement of his suit. The dismissal of criminal charges against the Plaintiff herein, stemming from the same incident, was a part of the consideration for such settlement. The Plaintiff now seeks to recover from the Defendant insurance company the amount of this settlement plus attorney's fees, a total of $11,121.08.

The trial of this case began on December 2, 1974, and at the close of all the evidence Defendant moved for a directed verdict. The Court recessed the jury, heard arguments on the motion, and concluded the motion should be granted. Briefly, the Court concluded there was a failure to give proper notice under the policy; the injury was not covered by the policy; and the settlement amount paid was, in part, for considerations other than Guillen's personal injuries, but no apportionment was shown. A detailed explanation

of the basis of our conclusions is now in order.

The insurance contract in controversy provides in paragraph 4 (a) that written notice of the "occurrence" shall be given by the insured to the insurance company "as soon as practicable" after the event. The proper application of this provision is govered by the law of Texas. Timely notification is a condition precedent to coverage under the policy. In the absence of waiver or other special circumstances, failure to perform the condition constitutes an absolute defense to liability on the policy. Klein v Century Lloyds, 154 Tex. 160, 275 S.W.2d 95 (1955).

The Texas Supreme Court in Daryland Mutual Ins. Co. of Texas v Roman, 498 S.W.2d 154 (Tex. 1973), has discussed the standard for evaluating whether the policy condition that notification be given "as soon as practicable" has been complied with. The Court held that while a minor insured is not excused from complying with the notice condition

of the policy, his age, experience, capacity, and knowledge of the insured are circumstances to be considered in determining whether the required notice was given "as soon as practicable". Id. at 158. In applying this rule, the relevant inquiry on a motion for directed verdict is whether on the facts as presented there exists a jury question as to whether notice was given the insurer in a reasonable period of time. Here, a 17-year-old high school student shot the alien crossing his father's property on June 19, 1971. Criminal charges were very soon filed against Thomas E. Kuykendall, and his father was aware of the incident and their potential liability.

Later, the alien filed a civil suit against the Kuykendalls. Service of process was had on August 9, 1971. Both the son and the father were insured under the policy here involved, and their attorney, after being advised on September 19, 1971,

of potential coverage under the policy, notified the insurance company by letter, dated September 22, 1971, of the shooting. This letter also inquired as to whether Southern Farm Bureau Casualty Insurance Company would defend the suit. The letter was received by the company on September 24, 1971. There was a lapse of ninety-seven days between the date of the shooting and the notification of the insurance company. The insurance company denied coverage by letters of November 24 and December 14, 1971, and received no further information until advised of Guillen's judgment.

While Thomas E. Kuykendall was a young and relatively inexperienced boy at the time of the shooting, we also must take into account that an immediate investigation of an occurrence of this sort ought to be made. The Court believes that ninety-seven days, absent some evidence of good excuse, is not "as soon as practicable" for notice

under the policy. See Central Surety & Insurance Co. v Anderson, 446 S.W.2d 897 (Tex. Civ. App. - Fort Worth, 1965, no writ). While the Texas cases in point are legion and conflicting, the Court finds there was not sufficient evidence presented to warrant submitting the question of timeliness of notice to the jury. The Court concludes that, as a matter of law, the insured did not comply with this condition precedent to coverage.

Another and stronger reason for granting a directed verdict in favor of the Defendant than untimely notice is that the cause of action pled by the alien against the Kuykendalls sounded in assault and battery. The insurer had no responsibility under the insurance contract to defend the insureds against such action. The insureds were protected from personal liability and the insurer was obligated to defend in suits for injuries arising out of an "occurrence." This term is defined in the policy as:

> "An accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

The insurer's duty to defend is defined by the allegations in the complaint filed against the insureds when considered in light of the policy provisions without reference to the truth or falsity of those allegations. Argonaut Southwest Ins. Co. v Maupin, 500 S.W.2d 633, 635 (Tex. 1973). And, this Court must determine if language of the complaint filed by Guillen in his suit, and the wording of the insurance contract, impose on the insurance company, as a matter of law, a duty to defend. Gustafson v National Insurance Underwriters, 517 S.W.2d 414 (Tex. Civ. App. - Eastland, 1974, no writ).

The allegations in the first amended complaint filed by an alien sounds of intentional tort by firearm. In part, those allegations were as follows:

"(Thomas Kuykendall) mercilessly and with incredible malice, coolly and deliberately picked up a high-powered rifle, aimed at the plaintiff (the alien) and fired several shots, hitting Plaintiff twice...

" VI

"If, as Defendant Thomas Kuykendall now claims, he shot in Plaintiff's general direction, not intending to hit Plaintiff but merely scare Plaintiff, he is, nevertheless, liable to Plaintiff for his damages, as such conduct on the part of this Defendant still constitutes an assault upon Plaintiff.

" VII

"Plaintiff says further that even if said Defendant did not intend to hit him, as he now claims, said Defendant acted recklessly and wantonly and was grossly negligent in aiming and firing a rifle in Plaintiff's general direction."

The complaint asserts an intentional tort in the first two paragraphs above quoted. The allegation that Thomas Kuykendall did not intend to hit Plaintiff does not reject the assault charge. And, there was no showing that the original complaint alleged any different facts or conclusions than those above set forth.

No matter how the act of young Kuykendall may be modified by descriptive words, he was charged by Guillen in his pleadings with an assault. And, the father's responsibility was based upon allegations that his son was about his father's business. The use of killing force in the manner alleged is essentially an allegation that an intentional tort has been committed. Restatement (Second) of Torts, Sections 13, 16 (1), 20 (1) (1965). An intentional tort is not an occurrence within the terms of this insurance contract. The Defendant Southern Farm Bureau had no duty to defend. Argonaut Southwest Ins. Co. v Maupin, supra, at 636. See also Winn v Continental Casualty Co., 494 S.W.2d 601 (Tex. Civ. App.-Tyler, 1973, no writ).

Finally, it is the opinion of this Court that the insureds' failure to present evidence from which a jury, or this Court could determine what

portion of the $11,121.08 settlement figure should be allocated to the dismissal of the criminal action against Thomas E. Kuykendall, and how much was paid to Guillen for his injuries in the civil case, precludes recovery. Certainly, the insurance company, Defendant herein, had no obligation to reimburse young Kuykendall for whatever amount he may have paid Guillen to drop the criminal charge. This could have been the main reason for the settlement. The insured had the burden in this suit of producing evidence from which apportioning of the settlement payment between "coverage" and any "non-coverage" item could be made. He did not meet this burden. The Court concludes there was no evidence of probative force offered by Plaintiff Kuykendall to support recovery. Winn v Continental Casualty Co., supra, at 606.

The Defendant's motion for a directed verdict is hereby granted. IT IS SO ORDERED. Copies

of this Memorandum and order shall be furnished appropriate counsel.

SIGNED this 26th day of February, 1975.

S/ Owen D. Cox
UNITED STATES DISTRICT JUDGE

CLEMENS, SPENCER, WELMAKER & FINCK
ATTORNEYS AT LAW
1805 National Bank of Commerce Building
San Antonio, Texas 78205
Area Code 512
227-7121

(list of attorneys in Firm omitted)

February 4, 1977

Mr. J. G. Hornberger
Attorney at Law
915 Victoria Street
Laredo, Texas 78040

Re: Cause No. 28,973--C. R. Kuykendall vs Southern Farm Bureau Casualty Insurance Company--111th District Court of Webb County, Texas

Dear Jack:

I placed calls for you on February 2 and 3, 1977, but you did not return them.

Hence, I am writing this letter.

This is to advise you that on January 31, 1977, Jessie Plocek who was a witness in the Federal Court suit, Civil Action 74 L 6, Thomas E. Kuykendall vs Southern Farm Bureau Casualty Insurance Company, telephoned me to say that she now recollected talking to Mr. Kuykendall on the phone about the incident in question, that she filled out a loss notice, that the agent at the time was Ottomar E. Hugo and the adjuster was Durwood Koehler, that Ottomar came in and after reading the loss notice and discussing the incident Durwood said that there was no coverage and to throw the thing in the trash and that Durwood

did that. In a subsequent conversation on February 1st, she told me that she and Hugo had read about the Kuykendall incident in the paper, that it was several months after it happened that Kuykendall called to report it to her, and that she did not remember the exact date.

Mrs. Plocek told me that when she testified in the Federal Court case that, in all honesty, she had no recollection of ever talking to Mr. Kuykendall on the phone and that she had though about it some more and now recollected as stated above.

Very truly yours,
CLEMENS, SPENCER, WELMAKER
& FINCK

S/ Edward R. Finck, Jr.
Edward R. Finck, Jr.

ERF:dg

RELEASE

STATE OF TEXAS |
KNOW ALL MEN BY THESE
COUNTY OF WEBB | PRESENTS:

THAT in consideration of the sum of Four Thousand and No/100 Dollars ($4,000.00) this day paid to me, I, Eusebio Guerrero Guillen, do hereby release, acquit, and forever discharge C. R. Kuykendall, and all other persons, firms and corporations from all claims, demands, and causes of action of any and every character, either in contract or in tort, which have accrued or may hereafter accrue for, or on account of, or in any way connected with any and all damages of every nature and kind whatsoever, actual or exemplary, because of, or resulting from an alleged assault by one Thomas Kuykendall, son of C. R. Kuykendall located about nineteen (19) miles east of Laredo in Webb County, Texas, approximately one (1) mile north of the Laredo-Hebbronville Highway as a

result of which alleged assault I, the said Eusebio Guerrero Guillen, received injuries to my right foot and right arm.

It is understood and agreed that the payment of the aforesaid sum and the execution of this release does not constitute an admission of liability on the part of the aforesaid party released, but said sum is paid by said party in compromise and settlement merely to buy his peace and to avoid the expense and harassment of litigation.

Said sum is accepted by the undersigned in full compromise settlement, not only for all damages because of the injuries mentioned above and the disability resulting therefrom, but also in full settlement of all claims on account of damages to property, including loss of use thereof, also for wages, time lost and all medical and hospital expenses. It is agreed that the undersigned will indemnify and save the aforesaid party released

harmless from any liability to any doctor or hospital because of medical care and hospitalization that has been received by the undersigned as a result of the aforesaid occurrence. Said release covers all future unknown damages on account of personal injuries and damages to and or destruction of property, as well as such damages, as are now known to have resulted from said occurrence.

As an inducement to the party hereby released to make this settlement and to pay said sum of money I, Eusebio Guerrero Guillen, hereby represent to the party hereby released that the undersigned is more than twenty-one (21) years of age, and fully understand that this is a complete and final release in full, and that the above named amount is all that is to be paid on account of the alleged assault mentioned and any other claim, demand, or cause of action which the undersigned may have

had against the party hereby released; that I rely wholly upon my own judgment, belief and knowledge of the nature, extent and duration of said injuries, disabilities and damages; that no representations or statements made about the matter by any attorney, agent, or other representative of the party hereby released have influenced me to make this settlement.

It is agreed that in Civil Action No. 71-L-28 styled Eusebio Guerrero Guillen vs Thomas Kuykendall and C. R. Kuykendall, in the United States District Court, Southern District of Texas, Laredo Division, I, the said Eusebio Guerrero Guillen, will file a second amended complaint omitting therefrom the said C. R. Kuykendall and that I will abandon my claim against the said C. R. Kuykendall in said Civil Action.

This release is the only agreement made concerning said settlement and no promise of

employment or any other agreement has been made in connection therewith, except as expressed in this release.

I have read all of this release before signing it, and fully understand that this is a final settlement and release and that I will not get any more money on account of the occurrence mentioned and any other claim, demand or cause of action which the undersigned may have had against the party hereby released.

I received no workmen's compensation benefits of any type as a result of the above described occurrence, and no one, other than me and my attorney, have any interest in my claim based upon the above occurrence.

IN WITNESS WHEREOF, the undersigned has executed this release in Laredo, Texas, on this the 28th day of September, 1973.

S/ EUSEBIO GUERRERO GUILLEN
Eusebio Guerrero Guillen

I, Oscar J. Pena, Attorney for the said Eusebio Guerrero Guillen, here now agree to the above settlement and here now approve and join in the above and foregoing release and acknowledge receipt of the payment to me of that part of such settlement to which I am entitled under my contract of employment by the said Eusebio Guerrero Guillen and I do further certify that the statements contained in such release by the said Eusebio Guerrero Guillen are true and correct, and that such release has been read or explained in full to the said Eusebio Guerrero Guillen in language understandable to him.

S/ OSCAR J. PENA
Oscar J. Pena

IN THE UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

EUSEBIO GUERRERO GUILLEN

VS CA NO. 71-L-28

THOMAS KUYKENDALL AND
C. R. KUYKENDALL

CONSENT JUDGMENT

The plaintiff, Eusebio Guerrero Guillen, filed his Second Amended Complaint herein complaining of the defendant, Thomas Kuykendall, having abandoned his complaint against the previously named defendant, C. R. Kuykendall, and the defendant having answered on the 26th day of September, 1973, all parties appeared before the Court, by and through their attorneys of record, and the plaintiff moved for judgment against the defendant, Thomas Kuykendall, in the sum of Eight Thousand Two Hundred Fifty and No/100 Dollars ($8,250.00), and the said defendant,

Thomas Kuykendall, consented to the entry of this judgment without contest. Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff, Eusebio Guerrero Guillen, do have and recover of and from the defendant, Thomas Kuykendall, the sum of Eight Thousand Two Hundred Fifty and No/100 ($8,250.00) Dollars, with interest thereon from date at the rate of Six percent (6%) per annum.

All costs of court are assessed against the defendant, Thomas Kuykendall, for all of which said judgment and costs let execution issue upon praecipe filed therefor by the said Plaintiff.

Signed and entered at Laredo, Texas, this 1 day of October, 1973.

S/BEN C. CONNALLY
Ben C. Connally

APPROVED:
S/ OSCAR J. PENA
Attorney for Plaintiff
S/ J. G. HORNBERGER
Attorney for Defendant

S/ EUSEBIO GUERRERO GUILLEN
Plaintiff

S/ TOM KUYKENDALL
Defendant